Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

No. 92-940

In the Supreme Court of the United States

OCTOBER TERM, 1992

ALM CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, REGION II

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 15 of the Toxic Substances Control Act (TSCA or the Act), 15 U.S.C. 2614, makes it unlawful to fail to submit any "reports, notices, or other information" required under TSCA or its regulations. One of the regulations promulgated under TSCA, 19 C.F.R. 12.121, requires an importer of chemical substances to submit, for each shipment of chemical substances, a certification that the shipment either complies with TSCA or is not subject to TSCA. The question presented is whether the court of appeals properly held that the Environmental Protection Agency reasonably construed the phrase "reports, notices, or other information" in Section 15 of TSCA to include the certifications required under 19 C.F.R. 12.121.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 974 F.2d 380. The decision and order (Pet. App. 28a-34a) and opinion and order (Pet. App. 35a-46a) of the administrative law judge and the final decision of the Environmental Protection Agency chief judicial officer (Pet. App. 18a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a-17a) was entered on September 2, 1992. The petition for a writ of certiorari was filed on December 1, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges an order of the Administrator of the Environmental Protection Agency (EPA) assessing $19,500 in civil penalties against petitioner. The penalties are based on petitioner's violations of a regulation implementing the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601-2629. The court of appeals denied petitioner's petition for judicial review of the Administrator's order. Pet. App. 1a-15a.

1. a. TSCA was enacted in 1976 to regulate the manufacture, processing, distribution, use, and disposal of chemical substances and mixtures. See 15 U.S.C. 2601.[1] TSCA authorizes the Administrator of EPA to establish regulations to implement the Act. Specifically, the Administrator may adopt regulations concerning the testing, manufacturing, processing, use, and disposal of existing chemical substances and mixtures, 15 U.S.C. 2603-2605; the manufacture of new chemical substances and the significant new use of existing substances, 15 U.S.C. 2604; and the control of chemical substances or mixtures that pose an

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[1] With certain exceptions not relevant here, a "chemical substance" is (15 U.S.C. 2602(2)(A)):

> any organic or inorganic substance of a particular molecular identity, including—
>
> (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and
>
> (ii) any element or uncombined radical.

imminent hazard to public health or the environment, 15 U.S.C. 2606. In addition, the Administrator is authorized to adopt record-keeping and reporting requirements. 15 U.S.C. 2607.

TSCA also gives the Secretary of the Treasury certain powers and responsibilities. As relevant here, Section 13(a) of TSCA requires the Secretary to refuse entry into the United States of any chemical substance or mixture that does not comply with TSCA or rules implementing TSCA. 15 U.S.C. 2612(a). Section 13(b) empowers the Secretary "after consultation with the Administrator * * * [to] issue rules for the administration of [Section 13(a)]." 15 U.S.C. 2612(b).

Section 15 of TSCA is entitled "prohibited acts." The portion of Section 15 at issue here provides:

It shall be unlawful for any person to —

* * * * *

> (3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this chapter or a rule thereunder.

15 U.S.C. 2614(3).

Section 16 of TSCA prescribes civil and criminal penalties for violations of Section 15. Section 16(a) provides that "[a]ny person who violates a provision of [Section 15] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." 15 U.S.C. 2615(a). Section 16(b) provides that "[a]ny person who knowingly or willfully violates any provision of [Section 15]" is

subject, upon conviction, to a criminal fine of up to $25,000 or a term of imprisonment of up to one year, or both. 15 U.S.C. 2615(b). Civil penalties under Section 16(a) are "assessed by the Administrator by an order made on the record after opportunity * * * for a hearing in accordance with [5 U.S.C. 554]." 15 U.S.C. 2615(a)(2)(A).

b. Pursuant to his authority under Section 13(b) of TSCA, the Secretary of the Treasury, acting through the Customs Service and in conjunction with EPA, has promulgated regulations governing the importation of chemical substances and mixtures. The regulation at issue here, entitled "Reporting requirements," states in relevant part: "The importer of a chemical substance * * * shall certify to the district director [of the Customs Service] at the port of entry that the chemical shipment is subject to TSCA and complies with all applicable rules and orders thereunder, or is not subject to TSCA." 19 C.F.R. 12.121(a); see also 19 C.F.R. 101.3 (listing districts of the Customs Service). The required certification must be signed by the importer or an authorized agent. 19 C.F.R. 12.121(a).

2. a. Between late 1985 and early 1986, petitioner imported nine shipments of plastic chips without complying with the reporting requirements prescribed in 19 C.F.R. 12.121.[2] Specifically, petitioner did not file any certifications for seven of the shipments; with respect to the two other shipments, petitioner filed certifications falsely stating that the

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[2] The plastic chips can be molded into consumer goods such as kitchen utensils. Pet. App. 3a.

shipments were not subject to TSCA. Pet. App. 45a-46a.

On June 23, 1986, EPA issued a complaint, compliance order, and notice of opportunity for hearing to petitioner. As subsequently amended, the complaint alleged that petitioner had violated Section 15 of TSCA, 15 U.S.C. 2614, by importing nine shipments of a "chemical substance" into the United States without the certification required by 19 C.F.R. 12.121. The amended complaint sought a civil penalty totaling $54,000 ($6000 for each of the nine alleged violations). Pet. App. 4a.

b. In an opinion and order issued on November 30, 1989, an administrative law judge denied petitioner's motion to dismiss the complaint and held that petitioner was liable for the charged violations. Pet. App. 35a-46a. In a subsequent order, the ALJ determined that the appropriate total penalty was $19,500 (rather than $54,000). *Id.* at 33a.

c. On October 11, 1991, the Administrator, acting through his Chief Judicial Officer, affirmed the ALJ's decision and issued a final decision assessing $19,500 in civil penalties against petitioner. Pet. App. 6a, 18a-27a.

3. The Third Circuit denied petitioner's petition for judicial review of the Administrator's order. Pet. App. 1a-15a.[3] The court rejected petitioner's con-

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[3] Petitions for judicial review of the Administrator's orders are authorized under 15 U.S.C. 2616(a)(3):

> Any person who requested in accordance with paragraph (2)(A) a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review of such order

tention that it had not violated Section 15(3) of TSCA because the certification required under 19 C.F.R. 12.121 was not a "report[], notice[], or other information" within the meaning of Section 15(3), 15 U.S.C. 2614(3). The court stated: "While other interpretations may be possible, EPA's interpretation of TSCA [Section 15] is a permissible construction which this Court will uphold." Pet. App. 12a (citing *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992)).

The court also rejected petitioner's contention that the Administrator lacked the authority to enforce 19 C.F.R. 12.121 because that regulation had been promulgated by the Customs Service rather than by EPA. The court observed that TSCA contemplates that "the Administrator shall carry out [the statute]," Pet. App. 12a (quoting 15 U.S.C.A. 2601(c)), and that nothing in TSCA or its regulations precluded EPA from enforcing the regulations promulgated by the Customs Service, Pet. App. 12a-13a. The court accordingly held that "EPA reasonably interprets the TSCA and its regulations as giving EPA the authority to impose TSCA civil penalties under [section 16] for failure to certify a shipment as required by 19 C.F.R. § 12.121." Pet. App. 14a.

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with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or that of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly upheld the EPA Administrator's interpretation of Section 15 of the TSCA. Under that interpretation, the Administrator has authority to assess a civil penalty for a violation of 19 C.F.R. 12.121. Even apart from the deference to which that interpretation is entitled under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), it represents the most natural reading of the statute.

First, a violation of 19 C.F.R. 12.121 is unlawful under Section 15 of TSCA. Section 15 of TSCA makes it unlawful to fail to submit any "reports, notices, or other information" required under TSCA or its implementing regulations. 15 U.S.C. 2614 (3)(B). The regulations implementing TSCA include those promulgated by the Secretary of the Treasury, acting through the Customs Service, pursuant to Section 13(b) of TSCA, 15 U.S.C. 2612(b). See 19 C.F.R. Pt. 12, Authority (19 C.F.R. 12.118 through 12.127 are issued pursuant to, *inter alia*, TSCA). Among the Customs Service's regulations is 19 C.F.R. 12.121, entitled "Reporting requirements."

As the title of 19 C.F.R. 12.121 suggests, the certifications required under the regulation constitute "reports, notices, or other information," 15 U.S.C. 2614(3)(B), as those terms are commonly understood. The certifications "report" or give "notice" to the district director that a chemical shipment has

occurred and that the shipment either complies with TSCA or is not subject to TSCA. Moreover, the certifications contain "information." See *Webster's Third New International Dictionary* 1160 (1986) (defining "information" as, *inter alia*, "something received or obtained through informing: as * * * knowledge communicated by others").

Second, the Administrator has authority to assess civil penalties for violations of 19 C.F.R. 12.121. As the court of appeals observed, TSCA contemplates that the Administrator will "carry out" the statute. Pet. App. 12a; see 15 U.S.C. 2601(c). In particular, Section 16(a) of TSCA authorizes the Administrator to assess a civil penalty for any "violation of [Section 15]." 15 U.S.C. 2615(a). As explained above, a failure to provide the certification required by 19 C.F.R. 12.121 constitutes a violation of Section 15. The Administrator accordingly is authorized to assess civil penalties for failure to comply with 19 C.F.R. 12.121.

2. Petitioner does not dispute the court of appeals' conclusion that it was reasonable for the Administrator to interpret Section 15 as proscribing violations of 19 C.F.R. 12.121 and to interpret Section 16 as authorizing civil penalties for such violations. Instead, petitioner argues (Pet. 10-13) that judicial deference to the Administrator's interpretation is not warranted because TSCA is a "penal statute[]" subject to the rule of lenity.[4] The rule of lenity, however, does not apply here.

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[4] Petitioner first made this argument in its reply brief in the court of appeals; petitioner's opening brief merely stated that "it remains axiomatic that penal laws are strictly

First, the rule of lenity applies only to criminal statutes, see, *e.g.*, *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1338 (1992); *Moskal* v. *United States*, 111 S. Ct. 461, 467 (1990); *Crandon* v. *United States*, 494 U.S. 152, 168 (1990), and the provisions at issue here are not criminal. This case arose out of a proceeding to assess civil penalties under Section 16(a) of TSCA for violations of Section 15(3) of TSCA; no criminal penalties were sought or imposed. Although a person who *willfully* violates Section 15 is subject to criminal penalties, that does not make Section 15 a criminal provision or convert this civil penalty proceeding into a criminal proceeding. See *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985) (IRS interpretation of provision imposing penalties for late filings was entitled to *Chevron* deference); see also *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 210 (1845).[5]

Second, the rule of lenity applies only when a reasonable doubt about the meaning of a statute remains after resort to the traditional tools of

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interpreted against the government." Pet. C.A. Br. 22. Petitioner's belatedness in advancing this argument weighs against further review.

[5] This Court's decision in *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), is inapposite. There, the Court applied the rule of lenity to a tax statute, even though the case arose "in a civil setting." *Id.* at 2109-2110. A plurality of the Court determined that the rule was applicable because the statute had "criminal applications that carry no additional requirement of willfulness." *Id.* at 2109 (opinion of Souter, J.). In contrast to the statute at issue in *Thompson/Center Arms*, TSCA conditions criminal sanctions upon a finding of willfulness. 15 U.S.C. 2615(b).

statutory construction. See, *e.g.*, *Moskal*, 111 S. Ct. at 465. No reasonable doubt can arise as to the meaning of the provisions at issue here. And contrary to petitioner's suggestion (Pet. 11), a statute is not "ambiguous" for purposes of the rule of lenity "merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government," *Moskal*, 111 S. Ct. at 465. Thus, the court of appeals did not err in failing to apply the rule of lenity, even if, as the court stated, interpretations of TSCA other than EPA's "may be possible" (Pet. App. 12a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993